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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1121

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and
UNITED STEELWORKERS OF AMERICA,
LOCAL UNION NO. 2176,
Petitioners,

v.

VULCAN MATERIALS COMPANY,
Respondent.

BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

OPINIONS BELOW

The opinion of the district court appears at 71 LRRM 2300 and 60 CCH L. C. ¶ 10,117 and is reproduced in the Appendix to the Petition (Pet. App. 22-32). The opinion of the court of appeals appears at 430 F. 2d 446 (5th Cir. 1970) and is reproduced in the Appendix to the Petition (Pet. App. 1-20).

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1970 (Pet. App. 22-32). Petition for rehearing and rehearing en banc were denied on September 18, 1970

(Pet. App. 33). The petition for writ of certiorari was filed on December 17, 1970. The jurisdiction of this Court is invoked by Petitioners under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a damage action specifically authorized by Section 303 of the National Labor Relations Act as the statutory remedy for injuries suffered by a secondary employer because of conduct made a secondary boycott unfair labor practice by Section 8 (b) (4) of that Act must be stayed pending arbitration under a labor contract grievance procedure which makes no reference to such actions and expressly limits the arbitrator's authority to the interpretation and application of the labor contract?

2. Whether this Court should review the lower courts' factual determination that a secondary employer which is neither subject to actual common control nor economically and functionally integrated with the primary employer is a "neutral" secondary employer?

3. Whether the criteria established by this Court in **General Electric** and **Carrier Corp.** should be overruled (or extended) in order to permit unions to encourage and induce work stoppages by employees of secondary employers who occupy secondary premises contiguous to those of the primary employer?

STATUTES INVOLVED

The following provisions of the National Labor Relations Act, as amended ("the Act") are involved: Section 8 (b) (4), 29 U. S. C. § 158 (b) (4), which is reproduced in relevant part at page 11, footnote 10 hereof; and Section 303, 29 U. S. C., § 187, which is reproduced at page 12, footnote 12 hereof.

STATEMENT OF FACTS

In February and March, 1968, Petitioners, United Steelworkers of America and its Local 2176,[1] in furtherance of a contract bargaining dispute with the Forman Ready-Mix Division of Kyle, Inc. ("Forman") induced and encouraged the employees of the adjacent Slag Plant of Vulcan Materials Company ("Vulcan") to engage in a work stoppage and threatened Vulcan with other economic pressures. Vulcan had no interest whatever in the Forman contract dispute having entered into a contract with the Unions in respect of the employees at its slag plant on December 31, 1967. By their wrongful secondary boycott Petitioners embroiled Vulcan, a secondary employer, in their dispute with Forman, the primary employer, for the purpose of causing Vulcan to put pressure on Forman to settle its dispute with Petitioners. Pursuant to Section 303 of the Act (28 U. S. C., Section 187), which specifically affords "an action for damages to a party adversely affected by a secondary boycott," Vulcan filed this lawsuit in the United States District Court for the Northern District of Alabama to recoup the damages it had suffered. Although the damage done to Vulcan's business occurred as the result of Petitioner's secondary conduct in furtherance of their labor dispute with Forman, Petitioners nonetheless contended that Vulcan's sole remedy lay under the grievance procedures of its contract with them, and, accordingly, moved to stay this action. The trial court denied their motion to stay and the court of appeals affirmed. Following a full trial the trial court entered an "Opinion in Lieu of Formal Findings" to the

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[1] In this brief United Steelworkers of America is at times referred to as "the International Union" and Local 2176 is at times referred to as "Local 2176." Also, the International Union and Local 2176 are at times collectively referred to as "Petitioners" or "Unions".

effect that Petitioners had violated the secondary boycott provisions of the Act, and entered judgment in favor of Vulcan in the amount of $24,621.36.[2] On appeal the Court of Appeals for the Fifth Circuit affirmed the trial court in all respects (Pet. App. 1-20). Petitioners sought rehearing and rehearing *en banc* both of which were denied (Pet. App. 21).

A. Facts Concerning the Sale by Vulcan of Its Concrete Producing Facilities.

Prior to December 29, 1967, Vulcan, through its Concrete Products Division, owned and operated a large number of concrete production facilities at various locations throughout the southeastern states, including a small ready-mix concrete plant at Gadsden on premises contiguous to those of the Gadsden slag plant operated by Vulcan's Southeast Division.

On December 29, 1967, Vulcan sold all of its Concrete Products Division facilities in Alabama, Georgia, Florida, Maryland, North Carolina and Tennessee to Kyle, Inc. (Pet. App. 3). Included in the sale was the small ready-mix concrete plant at Gadsden, Alabama.[3] Vulcan's decision to go out of the concrete products business was dictated by economic considerations. The principal officer of Kyle was a former official of Vulcan Concrete Products Division, and some of his associates held lesser positions in that Division prior to the sale (Pet. App. 23). The record is clear, however, that none held any position with Vulcan after the sale. The converse is also true. Neither Vulcan

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[2] Pet. App. 22-32, 71 LRRM 2300, and 60 CCH LC ¶ 10,117 (N. D. Ala. 1969).

[3] Kyle, Inc. has operated the Gadsden concrete plant under the name and style of "Forman Ready-Mix Company." The name "Forman" is used throughout this brief to designate the owner of the Gadsden concrete plant.

nor any of its officers or directors has any stock interest in Kyle. The purchase price arrived at through arm's length bargaining was $10,815,000. Kyle paid Vulcan $5,000,000 in cash at the closing and delivered to Vulcan a collateral installment note for the balance. That note and the other documents of sale contained conventional creditor protective provisions which are "common place in transactions of this kind to protect the interests of a lender and there is no evidence that Vulcan has ever been called upon to exercise the potential control so provided" (Pet. App. 7).

B. The Labor Negotiations Between the Unions and Vulcan Prior to Vulcan's Announcement of the Sale.

The collective bargaining agreement applicable to the Vulcan Gadsden slag plant, and to the Gadsden concrete plant sold by Vulcan to Forman, expired by its terms on December 31, 1967 (Pet. App. 3). During the term of that contract, a change in the Vulcan divisional set up placed the concrete plant in the Vulcan Concrete Products Division and the slag plant in a separate division, i. e., the Vulcan Southeast Division.

On or about November 1, 1967, a bargaining representative from the Concrete Products Division and a bargaining representative from the Vulcan Southeast Division met jointly with Petitioners to discuss renewal agreements in respect of the two plants (J. A. 123).[4] The Vulcan bargaining representatives proposed separate renewal agreements with basically the same terms and conditions to

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[4] "J. A." refers to the Joint Appendix to the briefs below. Vulcan's slag plant and Forman's concrete plant are two of approximately 8 employers whose employees are represented by Local 2176. Petitioners historically have treated **each** such employer individually; they negotiate and enter into separate collective bargaining agreements, handle grievances separately and exert economic pressures separately (J. A. 68-69, 99).

reflect the change in the Vulcan divisional setup which had placed the Gadsden concrete plant under different control and supervision from that of the Gadsden slag plant.

In late November, Vulcan made an oral commitment to sell all of its Concrete Products Division facilities to Kyle, Inc. The Vulcan negotiators informed Petitioners of the prospective sale, on or about December 1, 1967 (Pet. App. 3).

C. The Labor Negotiations Between Vulcan and Petitioners After Vulcan's Announcement of the Sale.

Subsequent to December 1, 1967, there were no negotiations between Vulcan and Petitioners with regard to a contract for the employees of the Gadsden concrete plant (J. A. 125).[5] The only discussions between Vulcan and Petitioners thereafter in any way pertaining to the Gadsden concrete plant involved Petitioners' request that something be worked out to lessen the impact of the sale upon affected long-service employees of Vulcan. Accordingly, on December 27, 1967, "Vulcan agreed with the Unions that long-term employees of the concrete facility who wanted to remain Vulcan employees could exercise their accrued seniority under the expiring labor agreement to obtain positions at the Vulcan slag plant. Forman, **after separate negotiations with the Unions**, agreed to credit its employees with their full seniority previously accrued with Vulcan" (Pet. App. 8) [Emphasis added]. In other words, after December 1, 1967, Petitioners looked exclusively to

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[5] Petitioners demanded that future negotiations in regard to the Gadsden **slag plant** be held jointly with the contract negotiations between Petitioners and Forman in respect of the Gadsden concrete plant. Vulcan had no proprietary interest in the future working conditions of the Gadsden concrete plant and, accordingly, rejected that demand; whereupon Petitioners continued their separate negotiations with Vulcan in regard to the slag plant (Pet. App. 3).

Forman with respect to future wages and other conditions of employment of the Gadsden concrete plant employee group.

As a result of negotiations between Petitioners and Vulcan a new three-year contract was entered into on December 31, 1967 which incorporated substantial economic improvements for the Vulcan's Gadsden slag plant employees (Pet. App. 3). The Vulcan employees continued to work under this new and improved contract until the Forman concrete plant strike of February 14, 1968.

D. The Labor Negotiations Between Forman and Petitioners for a Gadsden Concrete Plant Bargaining Agreement.

Subsequent to December 1, 1967, a number of negotiation meetings were held between Petitioners and Forman in regard to negotiating a collective bargaining agreement covering the Gadsden concrete plant employees of Forman. No representative of Vulcan participated directly or indirectly in these or any other Forman labor negotiations. When the labor agreement covering the Gadsden concrete plant expired on December 31, 1967, without a renewal agreement having been achieved with Forman, Petitioners did not strike immediately, but agreed with Forman to continue negotiations temporarily under an arrangement whereby Forman agreed to adopt terms and conditions of employment identical to those of the expiring contract until a new contract could be agreed upon.[6] That understanding was terminated effective February 14 when Petitioners, having failed to obtain the desired economic package from Forman, called a strike at the Forman concrete plant (Pet. App. 3-4).

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[6] Thus, from December 31, 1967 until February 14, 1968, the Forman employees worked under **different and less advantageous** working conditions than those enjoyed by the Vulcan employees.

E. Additional Facts Relevant to the Determination That Vulcan Was a "Neutral Secondary Employer."

The district court at paragraphs 21-23 of its opinion specifically found that Vulcan was a neutral secondary employer, vis-a-vis Forman, within the meaning of the Act (Pet. App. 29). This finding was found by the court of appeals to be fully supported by the substantive facts:

> "The fact remains that the basic operations and processes performed in the making of slag and performed in the making of concrete are carried out in different plants; that a different product is produced by each and that sales are made to essentially different customers; that Vulcan operates the slag plant for its own account and Forman operates the concrete processing plant for its own account; neither is a major customer of the other's products;[7] and the capital and the management of the companies is entirely separate and independent. Moreover, each carried on its own labor relations independent of the other subsequent to the sale" (Pet. App. 9).

As the record facts and the decisions of both the district court and the court of appeals make clear, the Forman concrete plant is not operationally connected with the Vulcan slag plant in any way and "the slag plant could operate whether the concrete plant was operating or not" (J. A. 130).[8]

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[7] Vulcan's geographically remote Glencoe, Alabama Stone Quarry was a substantial supplier of **stone** to Forman (J. A. 129).

[8] Petitioners in the district court, the court of appeals and here point to several minor overlaps and complications occasioned by the sale and transfer of ownership. However, in determining neutrality "the court must look to the **essence** of the relationship, and not to its incidental trappings" (Pet. App. 9). Both lower courts correctly found that these minor items did not go to the "essence" of the relationship. In fact, the prob-

F. Facts Relevant to the District Court's Determination on the Issue of Petitioners' Liability.

The Forman strike commenced at midnight February 13, 1968 and ended on March 15 when the Petitioners achieved a collective bargaining agreement with Forman. The strike was authorized by both the International Union and Local 2176. Its effect upon Vulcan was immediate, total and complete. From the very inception of the strike until it ended not a single Vulcan employee reported for productive work for Vulcan and the Vulcan's slag plant operations, accordingly, were at a total standstill.

The opinions of district court (Pet. App. 27-9) and the court of appeals (Pet. App. 11-16) detail the facts, substantially uncontroverted, which establish that Petitioners had engaged in an illegal secondary boycott by inducing and encouraging the employees of Vulcan not to work and by threatening Vulcan all for the purpose of causing Vulcan to in turn put pressure on Forman. Petitioners do not seriously challenge these findings so we quote a part of the court of appeals' decision wherein some of the more significant wrongful acts are summarized:

> "[T]he Unions used the picket line to induce and encourage Vulcan employees to refuse to work by placing Vulcan employees in charge of the picket line

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lems of transition occasioned by the sale were, for the most part, specifically recognized and dealt with in a side agreement incident to the sale whereunder Forman agreed to purchase certain minor services from Vulcan at an agreed price only until Forman could make arrangements to perform them itself (J. A. 268).

The number of hours actually spent by Vulcan employees in the performance of these tasks was small and the employees performing them were always supervised by and under the control of Vulcan. These services were only required when Forman was working and during the strike Vulcan's sole concern was the operation of its slag plant.

and by permitting and encouraging other Vulcan employees to be present at the picket line assisting Forman employees. Moreover, Vulcan employees were told at least twice that the picket line was legal and recognized by the Unions, it being the Unions' expressed policy that such picket lines should be honored, and by McAdams, the Unions' agent in charge of the picket line and erstwhile Vulcan employee, that he would not work for Vulcan while the Union struck Forman. These statements clearly constituted inducement or encouragement not to work. (Citations omitted.) The Unions also 'induced and encouraged' the Vulcan employees to stay away from work in violation of Section 8(b)(4) by calling the special meeting for February 28th to present an affidavit written in collective language for Vulcan employees to sign if they were going to remain off the job. (Citations omitted.) Finally, the Unions induced and encouraged Vulcan employees to stay off the job by their failure to take positive action to diminish the observable secondary effects of their strike against Forman. (Citation omitted.)

"Likewise, agents of the Unions threatened and coerced Vulcan for the purpose of causing Vulcan to cease dealing with Forman in violation of Section 8(b)(4) by threatening to close down Republic Steel, Vulcan's sole supplier of slag for the Gadsden plant, whose employees the Unions also represented, and by threatening that there would be a reoccurrence of the Bowman situation,[9] if Vulcan brought in supervisory personnel to run the slag plant."

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[9] "The phrase 'Bowman situation' refers to an earlier strike in the Gadsden area marked by serious violence, shootings, etc." (Pet. App. 14, fn. 6).

ARGUMENT

I

Arbitration of Secondary Boycott Claims

Petitioners, in the context of their labor dispute with Forman, brought about a work stoppage at Vulcan's Slag Plant, and applied other coercion and pressure to Vulcan so that Vulcan in turn would bring pressure on Forman to settle its labor dispute with Petitioners on their terms. This is a classic example of the secondary boycott, a tactic made an unfair labor practice by Section 8(b)(4) of the National Labor Relations Act,[10] and a tortious violation of federal labor law by Section 303(a) of the Act.[11]

Being thus victimized, Vulcan exercised its statutorily-conferred right, and brought this suit in a federal dis-

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[10] Insofar as pertinent, Section 8(b)(4) makes it an unfair labor practice for a Union "(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is: * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *"

[11] Under Section 303(a) it is expressly made unlawful "for the purpose of this section only" for a union to engage in "conduct defined as an unfair labor practice in section 8(b)(4) of the * * * Act."

Section 303(b) specifically confers upon anyone injured by a violation of section 303(a) the right to sue "in any district court of the United States * * * or in any other court having jurisdiction of the parties, and [to] recover the damages by him sustained and the cost of the suit."

trict court under Section 303(b) to recover damages for the injuries to its business as a result of the unlawful secondary boycott by Petitioners, and obtained a judgment for such damages. Based wholly upon the fortuitous circumstance that Vulcan, at the time of Petitioners' secondary boycott activity, was party to an unexpired labor agreement with Petitioners, Petitioners urged unsuccessfully on the courts below and renew here the claim that Vulcan's tort action under Section 303 should have been stayed and submitted as a grievance claim to an arbitrator under the arbitration procedure of said labor agreement.[12]

The Court of Appeals for the Fifth Circuit held that Petitioners' motion to stay Vulcan's Section 303 secondary boycott action in favor of a contract grievance proceeding was properly denied. In so holding, the Court expressly agreed with the holding and underlying rationale of the Court of Appeals for the Second Circuit in **Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Union**, 359 F. 2d 598 (2nd Cir.),[13] cert. denied 385 U. S. 832 (1966).

(a) The Decision of This Court in U. S. Bulk Carriers, Inc. v. Arguelles Is Dispositive of the Arbitration Claim.

Since the filing of the Petition for Certiorari herein, this Court has rendered a decision which we deem of controlling importance on the arbitration issue, *i. e.*, **U. S.**

[12] It should be noted that the arbitration procedure of the labor agreement between Vulcan and Petitioners not only contains no provision directing the arbitrator to hear and determine tort damage claims, but expressly provides that the arbitrator "shall only have jurisdiction and authority to interpret, apply or determine compliance with the provisions of this contract" (Article XVIII, Section 3(d), J. A. 255-56).

[13] The entire opinion in **Old Dutch Farms** is reproduced as an Appendix to this Brief.

Bulk Carriers, Inc. v. Arguelles (Bulk Carriers), ... U.S. ...., 39 L. W. 4101, 64 LRRM ¶ 11,422 (January 13, 1971). In **Bulk Carriers** this Court held that a seaman need not exhaust the grievance and arbitration procedures of his collective bargaining agreement with reference to his claim for wages but has the alternative right to pursue such claim for wages in court under a federal maritime statute (46 U. S. C. § 596), even though (unlike Vulcan's claim for damages for tortious secondary conduct) the seaman's claim clearly involved issues of interpretation of the substantive provisions of such collective bargaining agreement. Noting there was "no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration were • • • to assume • • • the roles served by the federal courts" under Section 596, the majority opinion emphasized that a money claim "is the kind of claim that is grist for the judicial mill" (39 L. W. at 4103), and that it would not be appropriate for this Court "to shut the courthouse door • • • [when Congress] • • • has said that it is open." *Ibid.* Furthermore, the "chronology of the two statutes § 596 and § 301 makes clear that the **judicial remedy was made explicit** in § 596 and was **not clearly taken away by § 301.** What Congress has plainly granted we hesitate to deny. Since the history of § 301 is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them. We would require much more to hold that § 301 reflects a philosophy of legal compulsion that overrides the explicit judicial remedies provided by 46 U. S. C. § 595." 39 L. W. at 4103 [Emphasis added].

The Court reached its decision in **Bulk Carriers** despite a "literal conflict" between the seaman's statute and the policies of § 301 applicable to grievance procedures. In the instant case there is no such conflict. Section 303 of the Act expressly prohibits secondary boycotts and ex-

pressly confers upon persons injured by them the right to sue in a court for damages. Like Seaman Arguelles, Vulcan seeks to "vindicate a federal statutory right" to money damages, a claim which is "grist for the judicial mill." 39 L. W. at 4103. Unlike Seaman Arguelles, however, Vulcan's court action is not predicated upon a statute in "literal conflict" with our federal labor law, *but rather upon a statute which is part of the federal labor law and which was adopted for the express purpose of dealing with one of the most insidious unfair labor practices the secondary boycott.* By adopting Section 303 at the same time it adopted Section 301 Congress made the judgment that the right to sue in a court for damages is the best means of furthering industrial peace in secondary boycott cases.

Thus, the considerations which impelled this Court to deny arbitration in **Bulk Carriers** are even more compelling where, as here, the "remedy" explicitly applicable to secondary boycott claims as a matter of federal labor policy is a lawsuit for damages. If, therefore, the "philosophy of legal compulsion" inherent in Section 301 does not override a maritime statute in conflict with it, it surely follows that the "explicit judicial [rights and] remedies provided by § 303," to a person injured by a secondary boycott, are at the very least co-extensive with, and not subordinate to, the rights afforded for breach of a labor contract by Section 301, another part of the same statutory scheme.

(b) **The Decision Herein of the Court of Appeals for the Fifth Circuit Furthers Sound Labor Policies Applicable to Secondary Boycotts and Does Not Contravene Federal Policies Applicable to Labor Contract Arbitration.**

The decision below constitutes a correct application of federal labor policies, carefully fashioned by Congress to

deal with a particularly odious and unfair kind of economic pressure—the secondary boycott.[14] The gravamen and inherent vice of the secondary boycott is that its sanctions bear not on the employer [Forman] who alone is a party to the dispute, but upon some third party [Vulcan] who has no concern in it." **National Woodwork Mfg. Ass'n. v. NLRB**, 386 U. S. 612, 626 (1967). In enacting Sections 8(b)(4) and 303 of the Act, Congress was essentially concerned with "shielding unoffending employers * * * from pressures in controversies not their own." **Local 20, Teamsters v. Morton**, 377 U. S. 252, 259 (1964), quoting **NLRB v. Denver Bldg. & Const. Trades Council**, 341 U. S. 675, 697. To that end Congress determined that such injured secondary employer should have independent remedies adequate to deal with this specific kind of conduct, both by way of Board proceedings under Section 8(b)(4) of the Act[15] and through court proceedings for tort damages under Section 303.[16] In short, as noted by this Court, in fashioning federal labor policy applicable to secondary boycott cases, Congress specifically provided "both administrative and conventional legal sanctions."

[14] Senator Taft who originated the language adopted as Section 303 in 1947 stated in floor debate "I may say that, so far as I know, no defense of this kind of strike was made throughout the testimony. There was a suggestion that there was some kind of 'good' secondary boycott, but no one was ever able to point to it and to say what it was" (93 Cong. Rec. 5061).

[15] Under Section 10(1) of the Act, the NLRB is empowered and directed upon a proper showing to seek injunctive relief from the Federal District Court against the continuance of secondary boycott activities, and following a hearing to issue a cease and desist order which is not self-executing.

[16] In Section 303, Congress "expressly authorize[d] state and federal courts to award damages to any person injured by [a] secondary boycott . . ." "The type of conduct to be made the subject of a private damage action was considered by Congress, and Section 303(a) comprehensively and with great particularity 'describes and condemns [it] . . .'" **Local 20, Teamsters v. Morton**, *supra*, at 253.

Longshoremen's Union v. Juneau Spruce Corp., 342 U. S. 237, 245 (1952). The legislative history of Section 303 strongly reflects this congressional preference for the ordinary lawsuit for damages as the appropriate means by which an injured third party might recover his losses from union secondary boycotts.[17]

In providing for lawsuits for damages under Section 303 Congress was concerned not only with the adequacy of remedies. Congress clearly believed that the mere threat of a lawsuit could play an important role in federal labor policies as a deterrent to the commission of secondary boycotts.[18] Each of these considerations was inseparably woven into a definitive policy incorporated as Section 303 of the Act, designating the ordinary lawsuit as the appropriate damages remedy in secondary boycott cases. Obviously, such Congressional policies would be largely thwarted if the employer's express right to sue in tort for violations of federal law were to turn upon the fortuitous circumstance that he has—or does not have—a

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[17] See 93 Cong. Rec., pages 5041, 5045-5046, 5051 and 5070.

[18] "Senator Ives:

"Once it is established that recovery may be had for damages in the Federal courts, it will go a long way toward stopping the jurisdictional dispute and secondary boycott" (93 Cong. Rec. 5041).

"Senator Taft: • • •

"I am so anxious to retain provisions covering the right to direct action in suits brought for damages in cases of that kind, that I have determined that I shall • • • offer the substitute [Taft amendment] which provides for direct suits in cases of secondary boycott. I think that will be a powerful deterrent" (93 Cong. Rec. 5045).

"Senator Taft. • • • I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdictional strikes" (93 Cong. Rec. 5059) • • • I do not think that suits will often be brought, because I believe the possibility of a suit will be a sufficient deterrent to prevent unions undertaking this kind of racketeering activity" (93 Cong. Rec. 5059).

labor contract with the wrongdoer, and Congress inserted no such qualification into the Act.

Furthermore, federal labor policies demonstrating a preference for labor arbitration as a means of settlement of labor disputes arise in the context of a different statute, Section 301 of the Act; are concerned solely with procedures for the enforcement of **contract** claims; and are predicated in substantial part upon the congressional declaration in Section 203(d) of the Act that "**final** adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of **grievance disputes** arising over the **application** or **interpretation** of an existing collective bargaining agreement." [Emphasis added.] See **Steelworkers v. American Manufacturing Co.**, 363 U. S. at 564, 566 (1960); **Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers (Drake Bakeries)**, 370 U. S. 254, 263 (1962). The underlying rationale is clear: if courts are permitted under Section 301 to interpret labor agreements, the efficacy of the labor contract's own grievance and arbitration procedures for the interpretation of labor agreements would be impaired, the stability of the contract thereby threatened, and the ultimate statutory objective, industrial peace, thwarted. **Steelworkers v. American Manufacturing Co.**, *supra*; **Steelworkers v. Warrior & Gulf Nav. Co.**, 363 U. S. 574 (1960). In the application of these policies this Court properly has held that suits under Section 301 for breach of a contract no-strike clause may properly be stayed if the contract arbitration procedures appear of sufficient scope to encompass such claims. **Drake Bakeries**, *supra*. In **Drake Bakeries**, the strike was a primary one, arising out of a labor dispute between the union and the primary employer with reference to the latter's right under the labor agreement to schedule holiday work. The issue presented—whether on the facts and circumstances of the underlying grievance dispute as to work schedul-

ing, the union had violated the contract no-strike clause—concerned matters of contract interpretation which are normal "grist in the mills of the arbitrators."[19] **Steelworkers v. Warrior & Gulf Nav. Co.**, *supra*, at 584.

Section 303 suits, on the other hand, are not grounded on the labor contract, but as previously noted, on a **statutory** prohibition, and do not present issues of contract interpretation,[20] but rather problems of **statutory** construction and common law tort damages issues which are "grist for the judicial mill." **Bulk Carriers**, 39 L. W. at 4103. It follows that the stability of labor contracts is in no way threatened by giving full play to the procedures established by Congress in Section 303 for dealing with and deterring secondary boycott conduct.

Furthermore, the road to industrial peace has many facets: Section 303 and Section 301 exist side by side with the procedures of the National Labor Relations Board as integral parts of a comprehensive federal scheme for dealing with industrial conduct.[21] There is no statutory war-

[19] "We simply remit the company to the forum it agreed to use for processing its strike damage claims. • • • Here, the union claims it did not call a strike, and that the men were not bound to work on January 2nd, basing its claim **upon years of past practice under the contract.** The dispute which this record presents, appears to be one particularly suited for arbitration if the parties have agreed to arbitrate. We hold that they did so agree and will hold the company to its bargain." **Drake Bakeries**, *supra*, at 266 [Emphasis added].

[20] A review of the opinion of the district court and the court of appeals makes clear that **no** issue of contract interpretation was raised or involved in the trial on the merits of the instant case.

[21] The language and substantive content of Sections 303 and 8(b)(4) are strikingly different from Section 301, in that the former, taken together, define precisely certain types of prohibited conduct and give a right to sue for damages for such conduct; Section 301, on the other hand, relates strictly to "[s]uits for violation of contracts." The language of Section

rant for the conclusion that the procedures prescribed in Section 301 of the Act in any sense are to take precedence over those so carefully spelled out in Sections 8, 10 and 303.[22]

8(b)(4) is set out in footnote 10 hereto. Sections 301 and 303 read as follows:

Section 301

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member of his assets.

Section 303

(a) It shall be unlawful for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

[22] "Congress itself has carved out exceptions to the Board's exclusive jurisdiction: § 303 of the Labor Management Relations Act * * * expressly permits anyone injured by a violation

(c) There Is No Conflict Between the Decision of the Fifth Circuit in the Case Below and the Decision of Any Other Court of Appeals.

Every court[23] which has considered the matter here raised has properly held that the statutory rights accorded under Section 303 to a person to sue for damages for tortious secondary boycott violations in a court before a jury of his peers are separate and distinct from those accorded to parties by Section 301 in respect of claims arising under labor contracts, and, accordingly, need not give way to contract procedures.

Petitioner's contention that such cases "conflict with decisions of the First, Third, Fourth, Seventh, Eighth and Ninth Circuits as well as with a later decision of the Second Circuit" (Pet. 16) is palpably erroneous. **None** of the cases[24] cited by Petitioners as constituting an alleged con-

of NLRA, Section 8(b)(4) to recover damages in a federal court even though such unfair labor practices are also remediable by the Board; § 301 of that Act * * * permits suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the Board." **Vaca v. Sipes**, 386 U. S. 171, 179-80 (1967).

[23] **Old Dutch Farms, Inc. v. Milk Drivers Union**, 359 F. 2d 598 (2nd Cir.), cert. denied, 385 U. S. 832 (1966); **Twin Excavating Co. v. Local Union No. 731**, 337 F. 2d 437 (7th Cir. 1964); and **Vulcan Materials Company v. United Steelworkers of America, AFL-CIO**, 430 F. 2d 446 (5th Cir. (1970).

[24] **Association of Industrial Scientists v. Shell Development Co.**, 348 F. 2d 385 (9th Cir. 1965); **Builders Ass'n of Kansas City v. Greater City Lab.**, D. C., 325 F. 2d 867 (8th Cir.), cert. denied 377 U. S. 917 (1964); **Winston-Salem Printing Press & A. U. v. Piedmont Pub. Co.**, 393 F. 2d 221 (4th Cir. 1968); **Seltzer & Co. v. Livingston**, 361 F. 2d 218 (2nd Cir. 1966), affirming 253 F. Supp. 509 (S. D. N. Y. 1966); **Austin Mailers Union v. Newspapers, Inc.**, 329 F. 2d 312 (5th Cir.), cert. dismissed pursuant to Rule 60, 377 U. S. 985 (1964); **Acme Markets, Inc. v. Retail Clerks**, 344 F. 2d 330 (3rd Cir. 1965), af-

flict with the instant decision arose under Section 303, none involved secondary boycotts, and none considered federal labor policies applicable to secondary boycotts. Without exception, Petitioners' cases involved Section 301 of the Act, and in that context, considered only claims predicated upon labor agreements, and their interpretation and such decisions in no way support Petitioners' position here.

It is apparent that Petitioners' arbitration claim presents no issue of substance which would warrant review by this Court.

II

Vulcan Was Properly Declared a "Neutral" by the District Court and the Court of Appeals

Petitioners ask this Court to make a **factual** review of the evidence and based on that review to reverse the finding that Vulcan was a neutral secondary employer entitled to the protections of Section 303. Petitioners can find no conflict between the decisions of the courts of appeals, so they instead claim there is "uncertainty" because the courts of appeals have in some cases found a secondary employer to be a neutral and in others have found the secondary employer not to be a neutral. Petitioners are "unhappy" with the result,[25] not "uncertain" about the standards to be applied. The court of appeals in the instant case set forth the generally established criteria for determining "neutrality" (Pet. App. 5). Then the court of appeals noted that since the issue of "neutrality" turns

firming 235 F. Supp. 814 (E. D. Pa. 1964); **Local Union No. 702 v. Central Ill. Pub. Serv. Co.**, 325 F. 2d 920 (7th Cir. 1963); **Sheet Metal Workers' Union v. Aetna Steel Products Corp.**, 359 F. 2d 1 (1st Cir. 1966).

[25] "The jurisdiction to bring up cases by certiorari . . . was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing." **Magnum Import Co. v. Francois Joseph de Spoturno Coty**, 262 U. S. 159, 163 (1923).

on the facts it cannot be determined by any rigid formula.[26] Rather, the issue can be determined only by a full consideration of the "factual relationship which the primary employer bears to the secondary employer", keeping in mind "the intent of Congress as expressed in the Act to protect employers who are 'wholly unconcerned' and not involved in the labor dispute between the primary employer and the union" (Pet. App. 5). The district court and the court of appeals both determined, as a matter of fact based on substantial record evidence, that Vulcan was a neutral employer entitled to the protections of Section 303 of the Act.[27]

With respect to "neutrality" Petitioners present **no issue** which warrants a review by this Court.

III

The Lower Court's Decision Does Not Conflict With the Criteria Established by This Court for Distinguishing Illegal Secondary Picketing From Lawful Primary Picketing

Petitioners attempt unsuccessfully to show that the lower court's decision is in conflict with the decisions of

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[26] In **General Electric** (366 U. S. 667 (1961)) this Court criticized the adoption of rigid formulas in the difficult labor field.

[27] We cannot permit to pass unnoticed Petitioners' wholly unsupported statement on page 18 of their petition that "Vulcan **created** the dispute by selling a portion of the plant to its supervisors in the midst of its negotiations with the Union * * *". The sale of the Gadsden Slag Plant was but a minor part of a multi-million dollar transaction involving all of Vulcan's concrete facilities in the southeastern states. $6,000,000, representing nearly 60% of the purchase price, was paid by the purchaser to Vulcan *in cash*. Contemporaneously, Vulcan reached full accord with Petitioners upon the terms of a labor contract at its Gadsden Slag Plant. The "dispute was created" when Petitioners in furtherance of their contract claims against Forman unlawfully threatened Vulcan and induced Vulcan employees not to work for Vulcan.

this Court in **Local 761 v. NLRB (General Electric)**, 366 U. S. 667 (1961) and **United Steelworkers v. NLRB (Carrier Corp.)**, 376 U. S. 492 (1964).[28] Petitioners notwithstanding, it is clear that the court of appeals properly applied the criteria of **General Electric** and **Carrier Corp.** to the facts and that Petitioners want this Court to give them another hearing on the facts. In reality, Petitioners seek to have this Court overrule, or at the very least significantly extend, the criteria established in **General Electric** and **Carrier Corp.** in order to permit a striking union to picket (and otherwise act) with **an object** of inducing work stoppages by employees of **all** employers who come to the primary premises and with **an object** of inducing work stoppages by employees of **all** employers (such **as Vulcan) who happen to occupy secondary premises** contiguous to the primary premises. As recently as January 12, 1971, in **NLRB v. Local 825, Operating Engineers (Local 825)**, ... U. S. ..., 39 L. W. 4097, 76 LRRM 2129, this Court has reaffirmed the criteria of **General Electric** and **Carrier Corp.** and thereby made clear that such an overruling or extension is not warranted.

In **General Electric** this Court made clear that Section 8(b)(4) is not a shield to protect a primary employer from **primary** economic pressures or to permit a primary employer to evade such primary pressures by subcontracting his normal production work to others. Nowhere, however, did this Court intimate that a bona fide secondary employer, such as Vulcan, may not invoke Sections 8(b)(4) and 303 to protect itself in the **conduct of its business on its premises** from the economic pressures of the primary dispute.[29] In **Carrier Corp.** this Court made clear that a

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[28] **Railroad Trainmen v. Jacksonville Terminal Co.**, 394 U. S. 369, 386-390 (1969), is also cited by the Unions, but is not discussed in this brief because there this Court merely reaffirmed the teachings of **General Electric** and **Carrier Corp.** in dictum.

[29] In **General Electric** this Court held that employees of secondary employers who come to the primary premises to per-

third party, whose "mission" in coming on the **primary** employer's premises is as a customer or supplier of the primary employer's normal operations, is disadvantaged by the primary picket line but that to eliminate such disadvantage would be to destroy primary picketing in toto. As stated in **Local 825** "some disruption of business relationships is the necessary consequence of the purest form of primary activity." 39 L.W. at 4089. However, picketing becomes "illegal secondary activity . . . when it interferes with business intercourse not connected with the ordinary operations of the primary employer." **Carrier Corp.**, 376 U. S. at 501. In both **General Electric** and **Carrier Corp.** the union picketed the **primary** employer's premises. In the instant case, Petitioners' contrary contention notwithstanding, the picketing took place at the gate of Vulcan **the secondary employer** not the gate of the primary employer.[30]

The "mission" of the Vulcan employees was not to come on to **Forman's** premises as a customer or supplier of Forman: The "mission" of the Vulcan employees was to come on to **Vulcan's** premises to operate Vulcan's slag plant, a "business intercourse not connected with the ordinary operations of the" Forman concrete plant. **Carrier Corp.**, 376 U. S. at 501. In **Carrier Corp.** "the picketing employees made no attempt to interfere with" the secondary employers' operations and the railroad employ-

form work unconnected with the normal operations of the primary employer may properly be protected from the picketing and other pressures of the primary strike through the establishment of a reserved gate at the primary employer's premises, while employees of secondary employers who come to the primary premises in furtherance of the normal operations of the primary employer are not entitled to such protection. 366 U. S. at 680-82.

[30] The evidence is clear that at the inception of the strike Vulcan requested Petitioners to picket only the clearly marked Forman gate. This request was refused (Pet. App. 11).

ees "were not encouraged to, nor did they, refuse to serve the other plants" (376 U. S. at 499): In the instant case the lower courts found that Petitioners were "using a sort of pressure that was unmistakenly and flagrantly secondary" (**Local 825**, 39 L. W. at 4069) in that Petitioners made every attempt to interfere with Vulcan's slag operation by picketing, threatening and otherwise acting with "an object of inducing [the Vulcan employees] to engage in concerted conduct against [Vulcan] . . ." (**General Electric**, 366 U. S. at 673) and as a result, Vulcan's employees were induced to and did refuse to work for Vulcan.

In addition, Petitioners assert that contrary to the teachings of this Court the court of appeals wrongfully required them to undo the secondary effects of their required them to undo the secondary effects of their "lawful primary picketing."[31] This is a clear attempt by Petitioners to have this Court reverse the **factual** findings of the lower courts. **First**, the court of appeals affirmed the district court's findings that Petitioners had engaged in prohibited conduct violative of Section 8(b)(4) not only by illegal picketing,[32] but also by their other conduct, intended to involve Vulcan in the Forman primary dispute (Pet. App. 15-16). In the words of this

[31] Petitioners state that this Court disapproved **Superior Derrick Corp. v. NLRB**, 273 F. 2d 891 (5th Cir.), cert. denied 364 U. S. 816 (1960) in **General Electric**. As we read **General Electric** this Court **did not** disapprove the basic rationale of **Superior Derrick** relied upon by the court of appeals in this case, but merely indicated that in **Superior Derrick** the fifth circuit may have placed too much reliance on the wording of a picket sign and not enough on the totality of the union's conduct. In the instant case the court of appeals pointed to many facts in evidence which established that an object of Petitioners' conduct was to induce and encourage a work stoppage by the Vulcan employees.

[32] "[T]he Unions used the picket line to induce and encourage Vulcan employees to refuse to work" (Pet. App. 15).

Court, Petitioners "activity was aimed directly at" Vulcan, a secondary employer which was "not involved in the dispute." Petitioners "engaged in a strike (and other conduct) against" this neutral employer "for the specific and overt purpose of forcing [Vulcan] to put pressure on [Forman] to" give in to Petitioners' economic demands, **Local 825**, 39 L. W. at 4099. **Second, General Electric, Carrier Corp.** and **Local 825** make clear that picketing (and other conduct) must be controlled, because it is illegal secondary conduct if, as in the instant case, such picketing "has an object of inducing" a work stoppage by the employees of a "business intercourse not connected with the ordinary operations of the" primary employer.

The lower courts' factual findings of illegal secondary conduct are based upon substantial record evidence and no issue is present which warrants a review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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APPENDIX

APPENDIX

Old Dutch Farms, Inc.,

Appellant,

v.

Milk Drivers and Dairy Employees Local Union No. 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Appellee.

No. 246, Docket 30076.

United States Court of Appeals
Second Circuit.

Argued Feb. 24, 1966.

Decided March 31, 1966.

• • • • • • • •

Before Waterman, Moore and Friendly, Circuit Judges.

Moore, Circuit Judge.

The appellee, Milk Drivers and Dairy Employees Local Union No. 584 (the union), is the collective bargaining representative for employees working in the New York metropolitan area milk industry. The union and the appellant, Old Dutch Farms, Inc. (the employer), were parties to an industry-wide collective bargaining agreement. In December 1962, a dispute arose between the employer and the union concerning whether the employer, by opening a milk "depot" in Brooklyn for the retail sale of milk and milk products, had violated Section 66A of the collective bargaining agreement.[1] This dispute was sub-

[1] § 66A of the collective agreement provides in relevant part that "it shall be a violation of this agreement for any party • • • to sell or distribute milk retail from wholesale trucks, or for employers to establish, service, or deliver to depots for the purpose of distributing or selling milk."

mitted to arbitration in the spring of 1963 pursuant to arbitration procedures provided for in the collective agreement. Subsequently, in May 1963, the union proceeded to induce employees of a neutral employer (a supplier of Old Dutch Farms, Inc.) to engage in work stoppages, and to threaten such employer, in an effort to cause such employer to cease doing business with Old Dutch Farms, Inc. Thereafter, Old Dutch Farms, Inc. filed a petition with the National Labor Relations Board (the NLRB) alleging that the union was engaged in unlawful secondary activity. On October 9, 1963, the NLRB held that the union had violated Section 8(b) (4) (i) and (ii) (B) of the Labor Management Relations Act (the LMRA), 29 U.S.C.A., § 158(b) (4) (i) and (ii) (B), 146 NLRB 509 (1964), and its decision was enforced by this court in January 1965. NLRB v. Milk Drivers & Dairy Employees Local Union No. 584, 341 F.2d 29 (2d Cir. 1965).

[1] In March 1965 the employer commenced the present action in the United States District Court for the Eastern District of New York, pursuant to Section 303[2] to collect damages for business injuries sustained as a result of the union's allegedly unlawful activity. The union made a motion to stay all proceedings in the action pending arbitration of the damage claim on the ground that the disputes came within the purview of the general arbitration

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[2] § 303 of the LMRA, 29 U.S.C., § 187 provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b) (4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

clause contained in the collective agreement. The arbitration clause provided that "any and all disputes and controversies arising under or in connection with the terms and provisions of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof, or in respect to anything not herein, expressly provided but germane to the subject matter of this agreement * * * shall be submitted for arbitration to an arbitrator * * *" The trial court granted the motion finding that the employer's statutory action presented a controversy which was "within the inclusive description of the arbitrable disputes," 243 F.Supp. 246, 247, set forth in the arbitration clause and concluded that "the dispute * * * arises out of the contract relation not only because it centered on the 'depot' clause in the contract, but also because Section 17 contained a no-strike clause which forbade the Union to 'call * * * any sympathetic strike of its members * * *'" 243 F.Supp. 246, 248. We reverse on the ground that the employer is not precluded by the arbitration clause in the parties' collective agreement from asserting in the district court a claim for tort damages based on the alleged unlawful secondary activity of the union and forced to rely upon arbitration for relief.

[2, 3] It is well established that whether an employer is required to arbitrate, as well as what issues he must arbitrate, "is a matter to be determined by the Court on the basis of the contract entered into by the parties." Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241, 82 S.Ct. 1318, 1320, 8 L.Ed.2d 462 (1962). Moreover, an employer "cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960); see John Wiley & Sons v. Livingston, 376 U.S. 543, 547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). Thus, the principal issue

raised by this appeal is whether the employer's tort damage claim constitutes an arbitrable issue within the meaning of the broad arbitration clause contained in the parties' collective bargaining agreement.[3]

[4, 5] This action arises under Section 303(a) and (b). It is in no way based on an alleged breach of contract and neither invokes nor needs to invoke the contract. The employer asserts that it was "injured in its business or property" and seeks damages solely for the injuries caused by the union's allegedly unlawful activity. Both the union and the district court maintain, however, that the employer's tort damage claim is an arbitrable dispute on the ground that it is connected with and "germane to the subject matter of" the collective agreement. Their theory is that the dispute is intimately related to Section 66A of the collective agreement since the business injury which forms the basis for the employer's Section 303 damage claim was caused by union activity which was originally provoked by an alleged breach of that section. They argue that since the union's secondary activity constituted a response to an alleged breach of contract by the employer, the damage claim is inextricably connected with the interpretation of the contract provision which it allegedly violated. But, this action bears no meaningful connection with the terms, conditions or subject matter of the parties' collective bargaining agreement. The fact that the union activity which forms the basis for this Section 303 damage suit was provoked by an alleged breach of contract by the employer is no reason to conclude that this suit arises under or is connected with the interpretation of the collective agreement within the meaning of the arbitration

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[3] It should be noted that the present suit constitutes a special case under § 303 in that there is a contractual relationship between the parties to the suit. § 303 provides an employer with a federal right to sue any union that damages him by engaging in activity proscribed by § 8(b)(4) irrespective of whether a contractual relationship exists between them.

clause. This is so, not only because this suit rests solely on Section 303 and cannot be considered as a contract claim[4] but, more significantly, because whether or not the employer violated Section 66.A of the collective agreement has no bearing on the validity of the Section 303 suit and the determination of the issues it presents, *viz.*, whether the union violated Section 8(b) (4) of the NLRA and whether and to what extent the employer sustained actual damages as a result of the union activity. Quite apart from the agreement and its arbitration clause, the present action arises under the terms and conditions of specific federal labor statutes, i. e., Section 303 of the LMRA and Section 8(b) (4) of the NLRA and is concerned only with their interpretation and application. Moreover, nothing in the broad arbitration clause involved here commits to arbitration disputes which are unrelated to the interpretation of particular provisions of the collective agreement or to the subject matter of the agreement. It cannot be said that the present dispute is germane, i. e., relevant, see Webster's New International Dictionary (2d ed. 1961), to the subject matter of the collective agreement for there is no indication either in the record or in the contract itself that the subject of tort damages suffered by either party to the contract ever was discussed or referred to by the parties when they negotiated their industrial code. Reason dictates that for a dispute to be characterized as germane to the subject matter of the contract it must at the very least raise some issue, the resolution of which requires a reference to, or construction of, some portion of the contract involved. Thus, "whatever other effect the agreement to arbitrate may have had, the agreement did

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[4] Judge Dooling's partial reliance on the non-strike clause in the parties' collective agreement to support his conclusion that the present action arose under the contract is erroneous. 243 F.Supp. 246, 248 (E.D.N.Y.1965). This action is not based in any way on an alleged violation of that clause by the union or, for that matter, on any violation of the contract by the union.

not even suggest that the question of violation (or not) of § 303 was arbitrable." United States Steel Corp. v. Seafarers' International Union, 237 F.Supp. 529, 532 (E.D.Pa.1965). In *Seafarers' International Union*, supra, the court in like manner dismissed a motion to stay a Section 303 damage claim pending arbitration, although it was admittedly confronted with a narrower arbitration clause than the one involved here. There the union argued that the employer's Section 303 damage claim should be submitted to arbitration on the basis of an arbitration clause which provided that "any alleged violations or disputes arising under this Agreement" shall be submitted to an arbitrator. The court concluded that the Section 303 action was not embraced in the arbitration agreement and, thus, refused to order arbitration pointing out that "parties cannot be compelled to go to arbitration on issues which they have not agreed to submit to arbitration." Id. at 532. See Twin Excavating Co. v. Local Union No. 731, 337 F.2d 437 (7th Cir. 1964).[5]

[6-8] There is a strong national labor policy favoring arbitration as a means of resolving disputes between parties to collective bargaining agreements concerning the interpretation or application of those agreements and, as

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[5] In *Twin Excavating Co.*, the Seventh Circuit affirmed the denial of a motion to stay a § 303 suit pending arbitration. The rationale of the court, however, does not clearly emerge from its two-page opinion. On one hand, the court raised serious questions about the validity of the arbitration clause in the collective agreement invoked by the union and, thus, its comments with respect to the arbitrability of § 303 claims can justifiably be treated as dictum. On the other hand, the decision can be construed as saying that the usual arbitration clause contained in collective agreements is not broad enough to encompass an action under § 303, for the court stated the issue before it as whether the LMRA "contemplated an arbitration proceeding as a substitute for a court hearing in a suit for damages under § 303," id. at 438, and the arbitration clause before the court provided only that all the conditions and articles of the collective agreement were to be enforced by a committee selected by the parties to the contract.

a result, arbitration clauses that relate to such disputes should be liberally construed. E. g., United Steelworkers of America v. Warrior & Gulf Nav. Co., supra; see Smith & Jones, The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law, 63 Mich.L.Rev. 751, 752-768 (1965); cf. Section 203(d) of the LMRA, 29 U.S.C., § 173(d).[6] Contrary to the union's position, however, such principles do not have any direct bearing on the issue presented here since they were formulated in the context of actions arising under Section 301(a), which authorizes suits for the violation of collective bargaining contracts, 29 U.S.C., § 185(a), and pertain to the desirability of *contract* arbitration as a means for insuring industrial peace. The interpretation and application of the terms of a collective bargaining agreement is a function that traditionally has been considered to be within the peculiar province of labor arbitrators and, therefore, it is reasonable to presume that when parties to a collective agreement insert a broad arbitration clause in it, they intend all disputes which require performance of that function to be determined by an arbitrator, unless they specifically exclude them from arbitration. Such reasoning, however, does not apply with equal force to suits, like the present one, which arise under Section 303 since the issues raised in such a proceeding are the kind which have traditionally been determined by courts and concern matters to which the expertise of labor arbitrators does not necessarily extend.

[9-13] The resolution of the present controversy requires (1) a determination of whether the union violated Section

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[6] § 203(d) of the LMRA, 29 U.S.C., § 173(d), provides in relevant part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of *grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.* (Emphasis added.)

8 (b) (4) of the NLRA,[7] and (2) an assessment of the actual business injuries sustained by the employer. Courts hardly can be considered less competent than a labor arbitrator, whose forte is more likely to be in the area of contract disputes and "employee's grievance claims * * *," Drake Bakeries v. Local 50, 370 U.S. 254, 267, 82 S.Ct. 1346, 8 L.Ed. 2d 474 (1962) (Harlan, Jr., dissenting), to determine whether particular union activities violate a federal labor statute or to assess the extent of an employer's business injuries. See Fleming, Arbitrators and the Remedy Power, 48 Va.L.Rev. 1199, 1220 (1962). Thus, there is no special reason to presume that the parties to a collective bargaining contract desire to submit to an arbitrator disputes concerned with an employer's statutory right to recover damages caused by specific union unfair labor practices which is entirely separate from any right conferred on him by Section 301, see United Const. Workers, etc. v. Laburnum Const. Corp., 347 U.S. 656, 665-667, 74 S.Ct. 833, 98 L.Ed. 1025 (1954); 2 Legis. History of the Labor Management Relations Act of 1947, 1371-1372

[7] Prior to the commencement of this action, the NLRB determined that the union had violated § 8(b) (4) of the NLRA. It should be noted, however, that a prior determination by the Board is not a pre-requisite to an action by an employer under § 303. The administrative and judicial actions and remedies are viewed as entirely independent, i. e., § 303 suits constitute a clear exception to the exclusive jurisdiction of the NLRB over alleged unfair labor practices. E. g., International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 342 U.S. 237, 72 S.Ct. 235, 96 L.Ed. 275 (1952); Note, 40 Ind.L.Rev. 55 (1964); see Local 20, Teamsters, etc. v. Morton, 377 U.S. 252, 258-259 n. 13, 84 S.Ct. 1253, 12 L.Ed. 2d 280 (1964); Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 Harv.L.Rev. 529, 549-550 (1963). Moreover, an administrative determination, such as the one involved here, does not bind the court confronted with the question of whether particular union activity violated § 8(b) (4) in a § 303 suit. Compare NLRB v. Deena Artware, Inc., 198 F.2d 645 (6th Cir. 1952), cert. denied, 345 U.S. 900, 73 S.Ct. 644, 97 L.Ed. 1342 (1953), with United Brick & Clay Workers of America v. Deena Artware, Inc., 198 F.2d 637 (6th Cir.), cert. denied, 344 U.S. 897, 73 S.Ct. 277, 97 L.Ed. 694 (1952).

(1948). "The less so, from the standpoint of the employer, when it is recognized that any damages awarded by an arbitrator would not be self-enforcing." Drake Bakeries v. Local 50, supra, 370 U.S. at 268, 82 S.Ct. at 1354 (Harlan, J., dissenting). This leads to the conclusion that absent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another, it must be assumed that the employer did not intend to forego his rights under Section 303 and that the parties did not intend to withdraw such disputes from judicial scrutiny.

The Supreme Court's decision in Drake Bakeries v. Local 50, 370 U.S. 254, 82 S.Ct. 1346 (1962), holding that a claim for damages based on a breach of a no-strike provision in a collective bargaining agreement under Section 301 should be submitted to arbitration does not suggest a contrary result. Although as a result of that decision the arbitrator may be called on to assess contract damages (assuming he finds that the parties intended to delegate that function to him), the primary question submitted to the arbitrator in *Drake Bakeries* was whether the strike activity on the part of the union violated a no-strike provision in the collective bargaining contract—a question which the Court stated "appears to us to be one particularly suited for arbitration." Id. at 266, 82 S.Ct. at 1353. In other words, whether the employer was entitled to contract damages turned on a question of contract interpretation which "was peculiarly within the expertise of an arbitrator." Smith & Jones, supra, at 767.[8] By direct

[8] Moreover, it has been pointed out that *Drake Bakeries* does not indicate how the Court would react to the questions "of arbitrability and arbitral authority under a bilateral arbitration provision where there is clearly a breach of the no-strike clause and the only issue concerns the nature of the remedy." Smith & Jones, supra, at 768.

contrast, the present suit under Section 303 does not raise any question of contract interpretation which can be characterized as particularly suited for arbitration. Rather, the validity of the employer's claim for tort damages turns solely on issues which are particularly suited for judicial adjudication.

Since nothing in the record or collective agreement involved here provides a basis for finding that the employer and the union agreed to submit the employer's damage claim to an arbitrator, we reverse the decision of the district court.

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